The

BAR ASSOCIATION BULLETIN

Entered as second-class matter, April 13, 1926, at the Postoffice at Los Angeles, California, under the Act of March 3, 1879

Volume 4, Number 10 JUNE 20, 1929 10c a copy $1 a year

Official Publication of the Los Angeles Bar Association, Los Angeles, Cal.

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Printed by PARKER, STONE & BAIRD COMPANY
Law Printers and Engravers
241 East Fourth Street Los Angeles, California

The BAR ASSOCIATION BULLETIN

VOL. 4 JUNE 20, 1929 No. 10

Published the third Thursday of each month by the Los Angeles Bar Association and devoted to the interests of the Association.

Some Legal Aspects of the Corporation Franchise Tax*

By W. SUMNER HOLBROOK, JR., *of the Los Angeles Bar*

The recently enacted corporation franchise tax has presented to the California bar and the clients its members represent, probably the most knotty tax problem of recent years. It is proposed in this series of four articles to discuss in a practical way some of the questions which probably will be of most frequent occurrence.

Many of these matters will undoubtedly come before the courts for adjudication, and most, if not all, will at least be passed upon in formal proceedings by the franchise tax commissioner or the State board of equalization. Without making any claim for infallibility or prophecy, it is believed that many of these questions will be simplified by a consideration of the former decisions in this and other jurisdictions.

I. WHAT CORPORATIONS ARE TAXABLE

In as much as the act defines a corporation as "a corporation,"[1] no question can arise as to the liability of business trusts and other forms of business enterprise not corporate in nature but using corporate devices. But it is not true that even *all* corporations are in some wise brought within the purview of the act. The excepted corporations fall into three classes:

1. Corporations (public utilities) already taxed under the gross receipts tax exclusively for State purposes.[2]
2. Corporations not doing business in this State.[3]
3. Corporations not falling within the classification of "financial, mercantile, manufacturing and business corporations."

Franchise Taxed Is That "To Do Business"; Not That "To Exist"

It has long been recognized that a corporate franchise "to exist" and a corporate franchise "to do business" are two separate and very different matters.[4] While it is possible for a State to tax the franchise to exist of a domestic corporation it may not do this in the case of a foreign corporation, since the right of the latter to exist is granted to it by its State of charter.[5] Thus, under the former franchise

1. Stats. 1929, Chap. 13, sec. 5.
2. California Constitution, Art. XIII, sec. 14, subds. a, aa and b, Art. XIII, sec. 15; Political Code, sec. 3664, et. seq.
3. "Every financial, mercantile, manufacturing and business corporation *doing business* within the limits of this State * * * shall annually pay to the State, for the privilege of *exercising its corporation franchise* within this State, a tax according to or measured by its net income * * * ." (Our italics) Stats. 1929, Chap. 13, sec. 4.
   Cf. Political Code sec. 3664 d providing for the former method of valuing corporate franchises as follows: These franchises shall includes the *actual exercise* of the right to be a corporation and *to do business* as a corporation under the laws of this State and the actual exercise of the *right to do business* as a corporation in this State when such right is exercised by a corporation incorporated under the laws of any other State or country * * *." (Our italics).
4. "These authorities demonstrate beyond cavil, that there is a distinction and a well recognized one between the franchise to be a corporation and one to do business as a corporation. One is the franchise 'to be'; and the other is the franchise 'to do.'" Union Steam Pump Sales Co. v. State, 216 Mich. 261, 272, 185 N. W. 253.
5. " * * * It follows from this principle that the tax cannot be upheld as a tax upon the franchise of the defendant exercised in this State for doing the interstate commerce business which it has carried on. It can be upheld only upon the theory that the defendant possesses some other franchise having a situs in this State. The franchise to do business as a corporation was possessed by the defendant before its advent into this State. Such franchise is personal property and its situs

*EDITOR'S NOTE: *This is the first of a series of four articles by Mr. Holbrook, dealing with the recently enacted Bank and Corporation Franchise Tax Act. The writer of the series is a member of the firm of Holbrook Taylor & Tarr. He is General Counsel for the California Taxpayer's Association, and he was formerly Deputy County Counsel in Charge of taxation and assessment problems and litigation.*

law, repealed by implication by the 1929 act, the mere right to exist of a domestic corporation was taxable.[6] Likewise, since 1916, the New York franchise tax has been based upon the privilege of exercising corporate rights, not upon their actual exercise.[7]

However, prior to 1916, in New York,[8] under the Massachusetts statutes[9] and the Federal capital stock tax,[10] the franchise taxable has been limited to the exercise of it in the doing of business, not its mere possession.

A careful distinction must, therefore, be made between the authorities decided under the one form of statute and those rendered under the other.

"Doing business" has been defined perhaps best in Von Baumbach v. Sargent Land Co., 242 U. S. 503, as follows:

> "The fair test to be derived from a consideration of them (cases) is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails, and doing only the acts necessary to continue that status, and one which is still active, and is maintaining its organization for the purpose of continued effects in the pursuit of profit and gain and such activities as are essential to these purposes."

In other words, a corporation to cease doing business does not necessarily need to surrender its charter or to cease all corporate acts, if those corporate acts are not done in accordance with the pursuit of gain under its primary purpose.

Paying taxes, interest on indebtedness, or borrowing money for such a purpose, has been construed as not doing business.[11] The purchase of stock to complete its holdings is a transitory act which will not render the corporation liable for a tax as "doing business."[12]

A corporation organized to take over the business of another corporation but to which the business has not yet been transferred, is not yet doing business, and is not taxable.[13] A railroad corporation which has leased its entire assets to an operating corporation, but which is exercising its rights of eminent domain on behalf of the lessee, it not doing business for the purposes of taxation.[14]

Summarizing the above as a few typical illustrations of what the courts have held in the matter, the court, in Eaton v. Phoenix Securities Co., 22 F. (2d) 497, stated the rule aptly at page 498 as follows:

> "The alternatives were not business or death; a minimum of activity is necessary to the persistence of even the lowest organizations."

Therefore, we can safely say that it is not necessary, in order for a corporation to rid itself from liability for taxation under the new act that it be shown that the corporation in question was legally dissolved.

The Effect of Edwards v. Chile Copper Company

Under the Federal capital stock tax, which, as we have pointed out, used the same language as is used in the California statute, there was handed down by the

is ordinarily the place of residence of the corporation; that is, its home office. But as its power to do business may be exercised elsewhere, it follows that when so exercised the franchise extends beyond the State from which it was obtained and acquires a substantial existence wherever it is so exercised." People v. Alaska Pacific S. S. Co., 182 Cal. 202, at page 207.

6. See note 3.
7. "For the privilege of exercising its franchise in this State in a corporate or organized capacity every domestic corporation, and for the privilege of doing business in this State, every foreign corporation, * * * shall annually pay in advance * * * an annual franchise tax, to be computed by the tax commission upon the basis of its entire net income, * * * ." New York Tax Law, sec. 209.
8. People v. Sohmer, 217 N.Y 443, 112 N.E. 181; People v. Glynn, 194 N.Y. 387, 87 N.E. 434; Lehigh Valley R. Co. v. Sohmer, 174 A.D. 732, 161 N.Y.S. 557, affd. 220 N.Y. 689. People ex rel. Butterick Co. v. Gilchrist, 213 A.D. 553, 211 N.Y.S. 75, affd. 241 N.Y. 591, 150 N.E. 567.
9. Attorney General v. Boston & A.R. Co., 124 N.E. 257, 258. Attorney General v. Ware River R. Co., 124 N.E. 289.
10. United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 35 Sup. Ct. 499, 59 L. Ed. 825; Von Baumbach v. Sargent Land Co., 242 U.S. 503, 516, 37 Sup. Ct. 201, 204; Edwards v. Chile Copper Company, 270 U.S. 452; Phillips v. International Salt Company, 274 U.S. 718, 71 L. Ed. 1323.
11. McCoach v. Minehill R. Co. 228 U.S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842; State L.&S.R. Co. v. Davis, 228 F. 246; Jasper & E. Ry. Co. v. Walker, 238 F. 533, 151 C.C.A. 469.
12. Three Forks Coal Co. v. U. S., 9 F. (2d) 946, 948.
13. Mason et la. v. United States, 27 F. (2d) 1013.
14. Attorney General v. B.&A.R. Co., 124 N.E. 257, 258; Attorney General v. Ware River R. Co., 124 N.E. 289.

United States Supreme Court a series of cases which were construed to hold that holding companies were exempt from taxation under the Federal statute. However, in Edwards v. Chile Copper Company, 270 U. S. 452, such a holding company was held taxable. It has been stated by some that under this decision the California statute might be construed to include as taxable any stock-holding activities of a corporation, under a loose interpretation of the words "doing business in this State."

This position seems entirely unsound and indeed contrary to the authorities relying upon the decision in the Chile Copper case, The facts of that case were that the corporation in question was expressly organized for the purpose of holding the stock of the Chile Exploration Company. As the court said, the Chile Copper Company "was a good deal more than a mere conduit for the Chile Exploration Company," as the former was the "brain or at least the efferent nerve" of the latter company. Moreover, it is interesting to note the scope given to the language of the Chile Copper case by the later decisions of the Federal courts. Thus, in Mason et al. v. United States, 27 F. (2d) 1013, the court had before it a case of a corporation organized to take over the business of another corporation not yet transferred to it, and the court held, relying upon the Chile Copper case, that the new corporation was not "pursuing ends for which it was organized."

Again, in Rose v. Nunnally Investment Company, 22 F. (2d) 102, the court had before it a corporation with its capital largely invested in stable stocks and bonds, but held that the corporation was not doing business, although the Chile Copper case was cited and discussed.[15]

Clearly, therefore, we may say that the Chile Copper case will be treated with caution by the Federal courts and the doctrine is not one which will willingly be expanded by them. Where a corporation is expressly organized as a holding company, it probably is doing business in so holding its securities, within the rule of the Chile Copper case. However, where a mercantile corporation, through an intended liquidation or even as a result of its policy over a period of years, becomes in fact the mere conduit of title for its stockholders in the securities of some allied corporation, it is clear that such corporation has too feeble an existence to be construed as doing business as the phrase is used in the California act.

What Constitutes Business Corporations

As pointed out above, the corporation franchise tax act does not purport to tax all corporations but only those of a "financial, mercantile, manufacturing or business" character. The first three terms are of rather narrow and widely understood meaning. The last, however, is one which will merit considerable study by the bar.

In the franchise tax laws of other States, such as New York, we find many excepted corporations.[16] Generally speaking, these corporations fall into the category of charitable or public service associations. Although in section 8 of the California act, where there are provided certain deductions from net income, provision is made for deducting proceeds of various transactions (such as no-profit sales by co-operation), nowhere in the act is there any exemption of such bodies as social clubs, cemetery associations, charitable associations and religious associations of all kinds. To the extent that these associations use the corporate form, they would seem to be liable under the act unless it can be said that the character or purpose does not fall within the classification of "financial, mercantile, manufacturing and business."

The United States Supreme Court, in Flint v. Stone Tracy Co., 220 U. S., 107, at page 171, defined business as follows:

"* * * that which occupies the time,

15. See also Del Norte Co. v. Wilkins, 28 F. (2d) 876, 877: "The thought that the tax liability arises upon the mere holding of property is fully negatived by the test and its application in many cases cited by the plaintiff. The mere hope or expectation that a capital investment may, through increment, produce profit, is not the equivalent of 'carrying on or doing business.' The latter, that is, its absence is the condition of exemption, and it is not to be construed as applicable only to such corporations as have suffered complete extinction, including assets and liabilities. * * *.

"The plaintiff's case seems to me clearly within the view enforced in recent cases, like Conner v. El Creek Lumber Company (C.C. A.), 8 F. (2d) 996, cited by the parties, and the conclusion there reached cannot and should not be here attempted to be evaded or avoided."

16. New York Tax Law, sec. 210.

attention, and labor of men for the purpose of a livelihood or profit."

The Massachusetts court in Goddard v. Chaffee, 2 Allen 395, gave the word a similar definition as follows:

"'Business' is a word of large signification, and denotes the employment or occupation in which a person is engaged to procure a living."

It might be contended that any non-profit association was not a business corporation within the meaning of the act. However, we find in section 5, subdivision K, of the act, an exemption, in the case of farm co-operatives, of the proceeds of their sales which were made on a non-profit basis.[17] Clearly there is a necessary implication from this provision that all non-profit corporations are not exempt from the tax.

It seems to the writer that a more satisfactory position is to look to the primary function of the corporation rather than to the existence or non-existence of a private profit in its activity. Thus, a farm co-operative engages in and competes with business if we use the definition employed by the decisions cited above, for it is doing that which men do "for the purpose of a livelihood" or "to procure a living." On the other hand, corporations of a social, religious and charitable nature do not conflict with the procurement of a living or livelihood by others, and to such an extent seem to the writer to fall into a class by themselves, to-wit, not engaged in any business whatsoever.

If this conclusion is sound, it would then follow that such associations are not liable to any tax, not even the minimum, under the new corporation tax law.

Conclusion

We have in the short space at our disposal attempted to point out a few of the difficulties surrounding the interpretation as to just what corporations are taxable under the new statute. Only one generalization can be made. Each corporation is or is not taxable, under the act, very largely upon factors peculiar to itself. A thorough understanding not only of those facts, but of the decisions, is necessary before a sound conclusion can be reached. It is safe to say, however, that undoubtedly many corporations have this year not only paid taxes in excess of what was due under the act, from a misunderstanding of the provisions applicable to their business, but, in many cases, have paid a tax which was probably not collectible at all under the provisions of the new statute. Such amount should, and probably will, be recovered in appropriate refund actions.

17. "In the case of farmers', fruit growers', or like associations organized and operated in whole or in part on a co-operative or a mutual basis, (a) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses, which may include reasonable reserves, on the basis of either the quantity or the value of the products furnished by them, or (b) for the purpose of purchasing, or producing, supplies and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses, all income resulting from or arising out of such business activities for or with their members carried on by them or by their agents; or when done on a non-profit basis for or with non-members." Sec. 5, subd. K, Stats. 1929, Chap. 13.

Special announcements by law firms of new locations and new associations are most effectively made to the profession through the pages of the BULLETIN. *In addition, such announcements serve as a manifestation of good-will toward and co-operation with the* BULLETIN *in its program of constructive endeavor for the welfare of the Bar Association.*

The President's Page

EDITOR'S NOTE: *President Guy Richards Crump has delegated the writing of this page for the present issue to Mr. Irving M. Walker, Junior Vice-President of the Bar Association.*

THE BOARD OF TRUSTEES

Fellow Members,
Los Angeles Bar Association:

Some years ago Justice McReynolds of the United States Supreme Court was the guest of honor at a luncheon at the California Club in this city. He prefaced his remarks by saying that we all knew that the Supreme Court consisted of a Chief Justice and Associate Justices, and that we all knew it heard arguments and rendered decisions; but that he imagined few of us knew how the court functioned when not exposed to public view. The Board of Trustees of your Bar Association does not presume to relate itself in importance or otherwise to the United States Supreme Court, but it does seem probable that few members of the Association know how the Board of Trustees functions when not seated uncomfortably at the speakers' table on the occasion of the monthly meetings. Without giving the matter much thought, the writer was personally of the impression for many years that the trustees' principal activities ended with their more or less regular attendance at these monthly meetings, and, with a full realization that the trustees were paid nothing for their services, had a rather well-defined idea that they were by no means underpaid.

No trustee, so far as my knowledge goes, ever sought that office. It is usually thrust upon the individual and accepted as both an honor and an obligation. When the individual trustee gets into harness he finds the honors fairly well offset by the burdens of office.

The Board meets regularly at 12:15 on Thursday of each week in a private room at the Los Angeles Athletic Club, where lunch is served at the expense of the individuals present. The meeting lasts certainly until 2:00 o'clock, and more frequently until well past that hour. There is much business and in great variety—as for example:

Usually there is a report from one or the other of the various standing committees. As a rule this report has been previously assigned for examination and study to an individual trustee and is presented to the Board by him. It is then made the subject of general discussion. If the report is approved, the president directs such action to be taken as may be indicated by the report. If the report is not approved, the chairman of the committee which prepared the report is asked to attend the next meeting for the purpose of discussing such features as do not commend themselves to the trustees.

The matter of reports (there are frequently a number of them) being disposed of, the Board more often than not finds itself called upon to consider what action, if any, the Los Angeles Bar Association should take with reference to certain pending legislation. Its support is asked in connection with various bills, many of which deal with matters in which the trustees as individuals are much interested, but which are refused consideration by the trustees as such because of a policy to support or oppose only those bills which affect directly the courts, judicial procedure and the practice of the law. The trustees have felt that the value of their support or opposition would be much lessened if distributed over too wide a field. An illustration of the type of legislation with which the trustees feel they may properly concern themselves may be found in the bills having for their purpose increase in salaries of the judiciary and increase of the number of Superior Court judges in this county. Many other illustrations might be supplied if space and your patience permitted. If some pending bill is approved, various steps are taken in its support and on occasion a committee is sent to Sacramento to present and urge the views of the Los Angeles Bar Association.

Following the discussion of pending legislation the Board may find awaiting its attention a communication from some person who feels that he has been singled out for harsh or unfair treatment at the hands of some individual judge. If there is a prima facie showing of such treatment, the matter is referred to the Judiciary Committee of the Association in order that it may be discussed with the judge in question. The trustees do not pretend to any

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precise function in such matters, but it has been found that such procedure usually results in an explanation which satisfies the complaining party and relieves the individual judge and the courts generally from what would otherwise have been a critical, and perhaps actually hostile, attitude on the part of the individual complainant and his friends.

From such matters as are above indicated the Board may and frequently does pass to the consideration of finances, to the closely related question of inducing delinquent members of the Association to pay their dues, to the problem of securing new members, to the conduct of the BULLETIN, and to a discussion of the possibilities of co-operation between the Los Angeles Bar Association and the various bar associations that exist in the various cities and towns of Los Angeles County. Incidentally, the members of the Board have had lunch, but it has been indicated that it is not altogether a social affair.

We have been considering the regular weekly meetings of the Board. There are special meetings which are held sometimes during business hours, sometimes after 5:00 o'clock p.m. and before dinner, and sometimes in the evening. These special meetings result at times from an accumulation of business that cannot be taken care of at the regular meetings, and at other times from emergency matters that require attention before the next regular meeting. The trustees, or certain of them, may be called into conference by the Judicial Council, or may have to appear before the Board of Supervisors of the County (as was the case quite recently) to obtain the approval of that board as a preliminary to the urging of the passage of legislation which is of concern to the county as well as to the members of the bar.

These are some of the activities of your Board of Trustees and there are many others which have not been detailed or referred to. It is hoped that those activities which have been outlined serve to show that the Los Angeles Bar Association has performed and is still performing definite functions which are of real value to the community and in particular to the members of the bar.

IRVING M. WALKER,
Junior Vice-President.

CORRECTION OF STATEMENT ATTRIBUTED TO BURON FITTS

On May 21 a local newspaper carried a statement purported to have been made by Mr. Buron Fitts, District Attorney, in an address given by him, which statement was a direct misquotation. Since the BULLETIN reaches a large number of the lawyers of Los Angeles County, Mr. Fitts considered it a good medium for correcting the error. So he wrote the editor a letter in which he called attention to the mistake of the newspaper and set forth what had really been said by him. As the BULLETIN appears only monthly, there was no opportunity at the time, through its pages, to rectify the mistake. It is felt, however, that in justice to Mr. Fitts, the letter calls for publication, even at this late date. The letter is as follows:

"Editor, Bar Association Bulletin, "May 21, 1929.
"Los Angeles, California.
"Dear Sir:

"There appeared in a morning newspaper a statement purporting to have been made by me in an address to members of the Ministerial Union, quoting me to the effect that '75 per cent of the lawyers should be in San Quentin.' This statement is entirely erroneous and misleading, and is a misquotation. I said substantially as follows:

" 'I am a member of the bar, and proud of the profession of which I am a member. I have always felt that lawyers, by reason of their special training, should be leaders in everything that pertains to the happiness and welfare of our country. In other words, they should be civic leaders. Unfortunately within the last ten years, due to the peculiar developments of the criminal element, there has sprung up within our profession a clique of lawyers known by the underworld as their 'mouth pieces.' Within this clique come the fixer, the shyster, the jail capper, and that member of the profession that splits his fee with peace officers.

" 'The bar associations throughout the country are continuously engaged in an endeavor to rid the profession of this class of attorneys.

"'I admire the lawyer who uses his best efforts and training in an honorable defense of a person charged with crime. I do feel that if 75 per cent of this clique of lawyers or 'mouth pieces' of the underworld were sent to the State prison the crime problem of our country would be materially reduced.

"'We are conducting the district attorney's office so that the honest, reputable members of the profession feel that they are welcome in the office at any time; so that if they feel the office has made a mistake in any case, that they are privileged to come to the office and discuss the facts with us, and that the office is fair enough to rectify immediately any wrong that has been done.'

"Personally I feel that the vast majority of lawyers are honest, sincere citizens, true to the best traditions of the profession and doing a valuable and necessary work, and I want them to feel that the lawyers of this office recognize and entertain for them this feeling of high regard and respect."

BF:DAA BURON FITTS, *District Attorney.*

The Night Court

By HONORABLE RAYMOND I. TURNEY, *Presiding Judge of Los Angeles Municipal Court.*

The first night court in California and, so far as I know, the first west of the Mississippi, was established in Los Angeles, Monday, April 15, 1929.

The fundamental purpose of the new court is to help poor and unfortunate persons. Its success or failure, to my mind, must be judged solely by the test of whether it affords such relief. Everything else is secondary.

The new court was set up in accordance with the thought of progressive men and women that whenever social, economic or moral conditions change, the machinery of the law must be changed to meet the new conditions.

The night court started with only two classes of defendants, persons charged with vagrancy and persons charged with drunkenness. The scope of the work soon will be broadened to take care of several other classes of criminal cases.

The vagrancy cases constitute a grave problem. The Bar Association in common with judges and citizens has long been concerned with the way vagrancy cases were handled. It was commonly conceded that, under conditions which formerly existed, many individuals were not accorded full justice. For years it was a common thing to handle alleged vagrants in companies. In other words they were given what some persons called "mass trials." This custom of dealing with human beings as if they were cattle, had a bad effect, not only upon the men themselves, but upon the police department and the public. It has been my contention as Presiding Judge, that every man charged with a public offense must be given a fair and speedy trial as an individual. This is his right, not only as an American citizen, but as a human being, and it must not be denied. These mass trials have been done away with in both the day and the night sessions of court. There will be no more of them, at least during my term as Presiding Judge. The work of Judge W. R. Garrett in handling the vagrancy cases in the day session along the lines of humanity and speedy justice has been very fine. I expect equally good results to be had in the night court.

It has been the practice to make a large number of arrests daily and nightly for alleged vagrancy. Many of the men arrested have, of course, been hardened, vicious individuals and sometimes professional criminals of the most dangerous types, and it is necessary that the judges presiding over vagrancy trials show good judgment in order that such men shall not be turned loose again to prey upon the public. On the other hand many of the men so charged have been simply individuals without money, friends, or jobs. Some of these men have made honest efforts to obtain work.

It formerly was almost invariably true that all men so charged would enter pleas of guilty. Some would be sentenced to jail and others, usually upon the recommendation of some police officer, were given suspended sentences or "floaters."

A considerable number of those pleading guilty were, in my opinion, guilty of no offense whatever.

The night court is expected to prove especially beneficial in providing prompt hearings for men of the last class. It seems to me unjust that a man should go out of the court with a stigma of a conviction as a vagrant against him simply because he may have thought, wisely or unwisely, that it would be easier for him to plead guilty and take a suspended sentence.

It is my belief that in cases where a man enters a plea of guilty to vagrancy, and the elucidation of facts shows clearly that he is not guilty, his case should be immediately dismissed and he should be liberated with a clear record. This policy should govern in the night court.

The court hours at present are from 8:00 o'clock until midnight. It is hoped to be able eventually to handle practically all emergency criminal cases as they arise after the day courts close, up to midnight. It will be possible thus to arraign all defendants in misdemeanor cases promptly, take bail and in some instances hold immediate trials. If conditions, in the opinion of District Attorney Buron R. Fitts, justify him in assigning a deputy to the court, it will also be possible immediately upon the issu-

ance of a felony complaint to hold an arraignment or even a preliminary examination and to admit the defendant to bail.

A bill has been passed by the State Legislature providing in some detail for a night court, and authorizing sessions of court on what are now non-judicial days, having particular reference to the period between Saturday noon and Monday morning. I do not know whether Governor Young will sign this bill or not. If it does not receive executive approval, no court sessions can be held of course on non-judicial days. It is reported that the bill will be signed but that there will be no provision for additional judges. Accordingly it seems that the judge who holds court at night will have to do some work in the day-time also.

Whether any new legislation goes into effect or not, there will be a night court under the authorization now given by existing law. Night courts, generally speaking, have proved successful in the East and South and I see no reason why such a court should not prove successful here. An attitude of sympathetic co-operation will do a great deal to make its functioning successful. It seems to be almost universally favored. The only objection I have heard has been voiced by one or two men on the ground that a night court was new. The city, in its village days, had been able to get along without one. Comment on any such "argument" I may safely leave to any intelligent person.

LOS ANGELES BAR ASSOCIATION MONTHLY DINNER AND MEETING

CHAMBER OF COMMERCE

Wednesday Evening, June 26, 1929, 6:00 P. M.

In order to obtain the speakers of the evening, the date of the regular June meeting of Los Angeles Bar Association has been changed from June 20 to Wednesday June 26. In view of the distinguished speakers and guests, the meeting promises to be indeed a noteworthy one; and a capacity attendance is anticipated.

Honorable William Lee Estes, United States District Judge for the Eastern District of Texas since 1920, will address the Bar Association on the subject, "Roger B. Taney." Judge Estes has attained wide recognition as a speaker of unusual ability.

Efforts are being made also to secure as a speaker Mr. Malcolm McDermott of Knoxville, Tennessee, formerly president of the Tennessee Bar Association. It is expected that the Program Committee will be successful in having Mr. McDermott present.

Guests of the evening are expected to be Honorable Curtis Wilbur, Judge of the United States Circuit Court of Appeals, Northern District of California; Honorable William P. James, Honorable Paul J. McCormick and Honorable Edward J. Henning, Judges of the United States District Court, Southern District of California; and Dr. J. S. Waterman, Dean of the University of Arkansas Law School.

There will be other interesting features to be announced later.

PROGRAM COMMITTEE

Kimpton Ellis, *Chairman* — Louis B. Guernsey
Florence M. Bischoff — Honorable Clair S. Tappaan
Justin Miller

Problems in Clearing Record Title

By Ex-Senator Walter Eden, *Chief Counsel, California Title Insurance Co.*

In the legal department of a large title company, charges sometimes come from the outside that title companies are too technical and require too much from attorneys —more than is necessary to cure a defective title. The fact is, however, that they are very liberal in passing on a title and always seek some way to ignore the defect if at all possible or to correct the title with the least expense to their customer.

Courts of general jurisdiction in dealing with matters in litigation have very large inherent powers, so that if the complaint shows a legal right of action pertaining to the property and if personal service is had on all necessary defendants, in most cases the title company will recognize a final judgment.

In probate matters, however, being proceedings 'in rem,' the Courts have jurisdiction to do only what they are authorized by the codes to do, and no more. If notices have not been posted and published exactly as provided by law, the court lacks jurisdiction to act. It might, and probably does seem to the layman, that when a publication of notice of sale by an administrator or guardian is required to be made for fifteen days, and notice has been published for only fourteen days, we are too technical when we say that the court has not power to confirm the sale.

If any sort of legal notice is required to be published, it must be published in a newspaper which does at least one-half of the mechanical typesetting for the paper in the city, or other legal subdivision in which the paper is required to be published.

We sometimes hear our legal department referred to as the 'Supreme Court.' We, however, are not responsible for the laws, such as the one that before a paper becomes a legal paper for publication of notices, it must do at least one-half of its own typesetting. The Legislature made that law and our Supreme Court very properly decided it was constitutional. In re Monrovia Evening Post, 199 Cal. 263.

We frequently have furnished to us deeds to file for record covering property to which we find deeds already filed to an unincorporated association. We are forced to decide that the deed is absolutely void for the lack of a grantee. It is almost universally decided by courts that such an association is not an entity capable of taking and transferring title to land. If such an association desires to take title to land, the deed must be made to a person or persons in being to hold in trust for the association. Phelan v. County of San Francisco, 6 Cal. 541; Rixford v. Zeigler, 150 Cal. 437; Ruddick v. Albertson, 154 Cal. 640; Copeland v. Fairview Land etc. Co., 165 Cal. 148, 162.

In the case of Ruddick v. Albertson, supra, the court decided that in such a deed the grantor holds the title to the land in trust for those who contributed to its purchase.

An unincorporated church should hold title to its real estate in the name of trustees. Bomar, et al v. Mt. Olive Missionary Baptist Church, 56 Cal. App. Dec. 789.

But our code, Act 687 General Laws, makes especial provision for unincorporated lodges and benevolent and fraternal Associations to take title directly to the lodge or association.

In a chain of title we often find deeds made to two people in the alternative. Such a deed is a nullity. Washburn on Real Property, 3rd Ed., Sec. 2118; Schade v. Stewart, 76 Cal. Dec. 663.

In the last mentioned case the court decided that a deed to the heirs *or* devises of a person deceased was a nullity, but on a rehearing decided the deed was sufficient because it was made to a class. However, it did not take back its decision that a deed made to grantees in the alternative was null and void. This decision was by a divided court. Unfortunately the court, in this case, made the following statement which, although it is obiter dicta, may cause much trouble in the future: "A deed granting the property * * * to the estate, naming it, would have been sufficient to vest title in those entitled to succeeed to the property." It is consistently held that a deed so drawn is void. 84 Am. St. Rep. 239; McInerny v. Beck, (Wash), 39 Pac. 130.

Deeds recorded after the death of the

grantor always raise a question as to their delivery in the lifetime of the grantor, and make it necessary for us to make a full investigation as to the fact of delivery, which always causes delay and annoyance to the customer.

A deed signed by a grantor whose name is not inserted in the body of the deed is null and void as to such grantor. This is also true of deeds by a corporation whose right to do business has been suspended for non payment of license tax. We can do nothing with such deeds but determine that they are null and void.

These are but few of the numerous questions that arise daily in the legal department of a title company and which must be answered and the matters settled before the company can safely issue its guarantee or policy of title insurance. The few specific cases given will serve to show why title company attorneys must ever be on the alert and why they are sometimes wrongly considered as "too technical."

Summary of the Bankruptcy Act.

By Honorable James L. Irwin, *Referee in Bankruptcy*

This article is written in answer to a response made by the editor of the Bulletin that I prepare a short summary of the Bankruptcy Act which might be of interest to the general practitioner. Realizing that an article of this nature will be of little interest to the bankruptcy lawyer because of the ordinary routine discussed, I have written it with the thought that the lawyer who seldom practices in the Bankruptcy Court might get some general information that would be of assistance to him.

It is generally well understood by all attorneys that there are two classes of bankruptcy, the voluntary and the involuntary.

In order to be adjudicated a voluntary bankrupt it is not necessary that the petitioner be insolvent within the meaning of the term. It is only necessary that he allege in his petition that he cannot pay his debts and that he is willing to turn his assets over to the Bankruptcy Court for distribution among his creditors. The schedules can be purchased at any stationery store and the procedure of directing a voluntary bankrupt through the Bankruptcy Court is very simple.

The question, however, of forcing an insolvent into involuntary bankruptcy is not so simple. It is not sufficient that he be insolvent, but he must have committted one of the six acts of bankruptcy. Indeed, on the other hand, if he has committed certain of the acts of bankruptcy, it is not necessary that he be insolvent. Space will not permit setting forth the acts of bankruptcy in full in this article. It might be well to call attention to the fact that the petition in bankruptcy must be filed within four months from the day of the commission of the act of bankruptcy. Once the alleged bankrupt is adjudicated in an involuntary case the procedure from that time on is the same as in a voluntary one.

All original proceedings are filed in the clerk's office of the United States District Court. The District Judge alone under the Act can make the adjudication. After adjudication the proceedings are transmitted to the Referee's office and thenceforth all with the right of review to the District proceedings are had before the Referee Court on any of his rulings. The petition for discharge must likewise be filed directly with the United States District Court and the judge alone can grant the discharge.

The matter of a discharge is of supreme importance to the general practitioner, as he represents the bankrupt more often than any other party to the proceedings and for this reason it is important that he be familiar with this phase of the bankruptcy law. The petition for discharge must be filed directly with the United States District Court within one year of the date of adjudication. Under a proper showing, which I might add is difficult to make, an extension of six months can be granted. However, if this time has elapsed, no further extension can be made and if his petition for discharge has not been filed within this time he is in a much worse position than if the bankruptcy proceedings had not been initiated, his failure to apply for a discharge being generally held as tantamount to the discharge being denied.

Another matter of importance to the general practitioner is the question of jurisdiction of the Bankruptcy Court. Very often clients represented by attorneys who are unfamiliar with bankruptcy practice are brought into the Bankruptcy Court on summary proceedings, whereupon the attorney is confronted with the question of the jurisdiction of the Bankruptcy Court to act summarily in the proceeding. I might state that where the possession of the property in question was in the bankrupt at the date of the filing of the petition in bankruptcy the Bankruptcy Court has jurisdiction to proceed summarily in the matter. However, if the property, real or personal, is held adversely under a title which is not merely colorable, the Bankruptcy Court has no jurisdiction in the matter. It is not settled as to whether the Bankruptcy Court has the power to grant injunctive relief in cases where the possession under a prima facie title is in a third party. The weight of authority however, seems to be in favor of the Bankruptcy Court granting injunctive relief where it appears the bankrupt estate has an equity in the property.

The practice and procedure followed in the Bankruptcy Court is the same as in any other Federal court, the Bankruptcy Court proper being the United States District Court and the Referee in bankruptcy being an arm of that court.

In case one of the parties to the proceedings is not satisfied with the decision of the Referee a review and not an appeal is taken to the District Judge. Appeals from thereon in bankruptcy matters to the United States Circuit Court and Supreme Court are the same as in other Federal proceedings. In contested cases both the adjudication and the petition for discharge are generally referred to the Referee as Special Master and he makes his findings and conclusions to the District Judge, which the Judge may or may not approve. Authority to approve compositions is also vested in the District Judge.

It might be well to state in simple language what is the legal meaning of a "composition in bankruptcy." It is an offer of settlement by the bankrupt to his creditors wherein the bankrupt offers a certain percentage on the claims, usually less than what is owing, and if this is accepted by the creditors and approved by the judge, the payment is made and the business is turned back to the bankrupt clear of the debts. This is a proceeding in bankruptcy whereby a debtor may settle with his creditors for less than the amount of their claims and still retain his business. A bankrupt generally raises this money from some outside source or by using the business which he expects to have returned to him as security for a loan.

In a very general way I consider this a fair summary of the Bankruptcy Act. The present law, known as the Act of 1898, has been in force longer than all other bankruptcy acts since the organization of the Government of the United States. It had been the theory of Congress prior to the passage of this act that a bankruptcy law should be enacted only at times following financial depressions to take care of temporary conditions and when such conditions had been cared for the law should be repealed. Apparently that condition or thought of Congress has changed and it now appears as though the present bankruptcy law, unless because of frauds attempted to be perpetrated under its name, will continue as one of the statute laws permanently, as it has in England for more than one hundred and fifty years.

In conclusion I want to call attention to the recently enacted statute in California prescribing a penalty by way of suspension of the operator's license, for failure to pay a judgment, based on the negligent operation of a motor vehicle. This statute unquestionably constitutes much-needed legislation. I have seen many pitiable cases in my court of children and others maimed for life by careless automobile drivers, and after judgment was recovered against them these drivers have gone through bankruptcy cleared of this debt, leaving a wake of cripples and indigent persons in their paths. Any law which has a tendency to alleviate this unfortunate situation is most beneficial; and the statute referred to, which will result in the carrying of automobile insurance to become more widespread, is a decided step forward.

Case Note

FEDERAL EMPLOYERS' LIABILITY ACT — RIGHT OF INJURED RAILROAD SWITCHMAN TO RECOVER FOR PERSONAL INJURIES WHERE HIS EMPLOYMENT WAS PROCURED BY FRAUD.

One Joe Rock, on October 1, 1923, applied for employment as a switchman in the Kolzo, Illinois yard of the Minneapolis, St. Paul and Sault Ste. Marie Railway. The rules of the railway required all applicants for employment to undergo and pass a medical and physical test. Joe Rock was rejected as physically unfit. Joe was insistent and a few days later, he returned, this time giving his name as John Rock. The superintendent did not recognize him and accepted Joe, alias John, Rock, subject to examination as to physical fitness. Rock then procured one Lenhart to impersonate him at the taking of the physical

test. The test was satisfactory, and by means of this fraud Rock was put to work as a switchman. About one year later, Rock was injured while performing his duties as a switchman. Subsequent to this date, the railroad first learned of the employee's deception. Rock sued the railroad in the Cook County court, and recovered a $15,000.00 verdict. The appellate court of the State affirmed the judgment. On certiorari to the Supreme Court of the United States, *Held*: the judgment should be *reversed*. (*Minneapolis, St. Paul and Sault Ste. Marie Railway Company* v. *John Rock,* No. 454, Adv. Op., U.S. Supreme Court (May 13, 1929).)

The reasoning of Mr. Justice Butler, who wrote the opinion, is in substance as follows: Rock was an imposter; he obtained his employment by deception and fraud. Common carriers owe a duty to the public to employ only those who are competent and physically fit. There is therefore a public interest attached in seeing that a man of this sort does not take advantage of the statutory benefits of the Federal Employers' Liability Act. To recover under the act, one must be an "employee" within the meaning of the Act. Notwithstanding that Rock had actually performed the services of a switchman, he was not an employee, because his contract of employment was obtained by fraud. "Right to recover may not justly or reasonably be rested on a foundation so abhorent to public policy."

This problem apparently has caused considerable difficulty, for one finds upon investigation that the rule in the lower courts has not been uniform as to the effect of fraud in the obtaining of the employment, upon the employee's right to compensation under the Act. See Kansas City M. O. Ry. etc. v. Estes, 228 S. W. 1087 and Payne v. Daugherty, 283 F. 353, where the defense was held of no avail. On the other hand in Stafford v. Baltimore etc. R. Co., 262 F. 807, the defense was held to be valid on a motion to strike. See 45 U. S. Code Ann., Sec. 51, note 63.

It may well be questioned whether this decision of the Supreme Court is sound. Granted that the contract of employment is void, is that not a matter extraneous to the question of the man's right to recover for injuries sustained while he actually performed the duties for which he was paid? The court admits that the personal defects of Rock in no way contributed to the accident. In what way then should the court be concerned with whether or not Rock obtained his job by fraud? He is being penalized for it—or rather his family and dependents are being made to suffer. More confusion of morals and law. If the rule laid down is that where an empolyee working for a railroad is physically unfit and by fraud obtained his position, he should be barred from receiving the benefits of the Federal Employers' Liability Act, because his deception endangers the public, the holding is perhaps justifiable. But if the case is to stand for the proposition that whereever the contract of employment is void or voidable for some reason or other, the employee should not recover, the decision is dangerous.

For example, an employee may not state his age correctly, or he may falsely state that he has not previously been engaged in strike activities. So long as the railroad needs the man, it will pay him wages and accept his services; but should he be injured, the railroad would be allowed to take advantage of this misstatement. The chances for injustice are too widely opened by the decision in the Rock case. This principle of the Supreme Court decision will be snatched at by numerous industrial accident commissions and like boards. No doubt, the Supreme Court will have to be asked in a later case to state the extent of its holding in the Rock case.

HARRY GRAHAM BALTER,
Assistant United States Attorney.

Annual Report of the Committee on Illegal Practices for 1928-29*

(Filed February 21, 1929)

To the Los Angeles Bar Association:

Your Committee on Illegal Practices respectfully reports as follows:

Your Committee's first meetings were devoted to a consideration of the known practices of licensed attorneys and unlicensed persons engaged in activities incidental to legal work. It became readily apparent that the three major fields of investigation were:

First: Ambulance chasing;

Second: Unethical advertising; and

Third: The activity of laymen who were bringing disrepute to the legal profession by the solicitation of damage suits, the use of pseudo legal forms, and other acts.

Your Committee frankly admits that the product of its year's work is little more than a comprehension of the matters to be investigated. Many of the apparent problems have been removed by the adoption of the rules promulgated by the Judicial Council, which became effective shortly after your Committee was appointed. When these rules became effective it was noticeable to your Committee that much of the advertising by lawyers, in the newspapers for example, disappeared. Several ambulance chasing lawyers ceased their activity in the face of the power of the Local Administrative Committees. A sufficiently large number, however, are still operating, so that there is a decided problem facing the Bar Association. This subject of solicitation for damage suits was deemed by your Committee of first importance, and a special Sub-Committee Report has been prepared, and it will probably be most convenient at this time to insert that report as part hereof, as follows:

"From a consideration of newspaper reports, statements of public officials, information furnished by practicing attorneys, complaints by insurance companies, and the personal knowledge of members of the Committee, there unquestionably exists in Los Angeles County an active, although not widespread condition of 'ambulance chasing' by means of which certain attorneys derive most of their practice. For example: incident to the St. Francis Dam disaster early in 1928, the practice of soliciting representation of claimants by certain men holding licenses to practice law was brought to light. Although the services of this Committee were offered they were not deemed necessary, and the office of the City Attorney of Los Angeles met the situation effectively. The adoption of the 'Rules of Profesional Conduct' by the State Bar tended in a measure to discourage the operations of some attorneys, but the Committee is informed that the practice of ambulance chasing still exists. Some of these practitioners employ cappers who solicit suits directly from persons injured; some have arrangements with members of the police force; some secure tips from the Receiving Hospital and private hospitals or doctors, but in all instances that have come to the attention of the Committee there is an outside connection. From the statements made by the insurance adjusters and attorneys for insurance companies at a meeting of this Committee on November 1, 1928, we are of the opinion that there is a decided active practice prevailing of ambulance chasing.

"Prior to the adoption of the 'Rules of Professional Conduct' the only punishable offenses an attorney could be guilty of were those enumerated in the Code of Civil Procedure and the Penal Code. Section 287, Code of Civil Procedure provides for the removal or suspension of an attorney for 'lending his name to be used as attorney and counsellor by another person who is not an attorney and counsellor.' It is to be noted that there is no prohibition against advertising or soliciting business. In re Collins, 147 Cal. 8, holds that the

*EDITOR'S NOTE: This report has been *referred to the Board of Trustees of the Bar Association for further consideration and approval.*

causes for disbarment are limited to those matters enumerated in Section 287, and In re Wells, 174 Cal. 467, holds that the same section controls all disbarment proceedings. By the provisions of section 647 of the Penal Code, subdivision 9, a vagrant is defined to be 'every person who acts as a runner or capper for attorneys in and about the police courts or city prisons'. It therefore appears that, aside from the rules adopted by the Judicial Counsel, there is no law affecting the practice of ambulance chasing by which an attorney is subject to suspension or removal, unless it be for the conviction of a misdemeanor involving moral turpitude referred to in subdivision 1 of section 287, Code of Civil Procedure, and it is the opinion of this Committee that it would be difficult to prove the element of moral turpitude.

"In view of the decisions above referred to it therefore appears that disbarment or suspension could not be made for any offenses other than those enumerated in the Code sections quoted.

"The adoption of the State Bar Act is now to be considered in its effect on the subject. The powers given to the Board of Governors are of course only such as are expressly stated in the Act, and the pertinent sections are as follows:

'Sec. 25. With the approval of the supreme court, the board shall have power to formulate and enforce rules of professional conduct for all members of the bar in the state.

'Sec. 26. The board of governors shall have power, after a hearing for any of the causes set forth in the laws of the State of California warranting disbarment or suspension, to disbar members or to discipline them by reproval, public or private, or by suspension from practice, and the board shall have power to pass upon all petitions for reinstatement.

. . . . .

'Sec. 29. The rules and regulations adopted by the board when approved by the supreme court shall be binding upon all members of the state bar and the willful breach of any of such rules shall be punishable by suspension from the practice of law for a period not to exceed one year.'

"It is to be noted that section 26 makes suspension or disbarment only for the causes set forth in the laws of the State, and were it not for the language of section 29 we might well conclude that the rule making power of section 25 was not to be considered as the right to define new offenses. But perhaps this doubt is cleared by section 29, although it may there be questioned as a delegation of legislative authority. The Committee will assume, however, that the rule making power is cosntitutional.

"The practice of ambulance chasing appears to be affected by Rule III, which is as follows:

> 'A member of the State Bar shall not employ another to solicit or obtain or remunerate another for soliciting or obtaining professional employment for him; nor shall he, directly or indirectly, share with an unlicensed person compensation arising out of or incidental to professional employment; nor shall he, directly or indirectly, aid or abet an unlicensed person to practice law or to receive compensation therefrom; nor shall he knowingly accept professional employment on behalf of a claimant in a personal injury or death case offered to him as a result of or as an incident to the activities of an unlicensed person that, for compensation, controls, directs, or influences such employment.'

"Analyzing this rule it appears that the following practices are forbidden:

"1. To employ another to solicit professional employment.

"2. To remunerate another for soliciting professional employment.

"3. Directly or indirectly sharing with an unlicensed person compensation incidental to the employment.

"4. Directly or indirectly aiding an unlicensed person to practice law.

"5. Directly or indirectly aiding an unlicensed person to receive compensation from the employment.

"6. Accepting professional employment as a result of, or as an incident to, the activities of an unlicensed person that, for compensation, controls, directs, or influences such employment.

"It very clearly appears that the mode of practice engaged in by most attorneys guilty of ambulance chasing is covered by one or more of the clauses of the rule. To prove a violation, however, would seem extremely difficult, although it has been suggested that the presence of an attorney representing parties in a sequence of cases might raise the inference where direct proof might be lacking. The persons ordinarily employed are not attorneys, and it is their custom where the parties liable for injuries are covered by insurance, to approach the insurance companies, and with or without disclosing the name of the attorneys, seek settlements. It is thought that with the assistance of the insurance adjusters a list of attorneys whose names frequently recur in connection with the settlement of such matters, might be readily compiled, and linking that with persons who solicit the employment, the inference might well arise of a definite connection. It is possible that further information may be obtained by consulting the claimants themselves and inquiring as to the origin of the representation.

"It is the opinion of the Committee that a competent investigator devoting his time exclusively to this subject would nuearth sufficient proof to bring the attorneys so engaged within the purview of the rule.

"At a meeting of the Board of Governors of the State Bar held at Santa Rosa on July 18 and 19, it was pointed out that perhaps the best solution of the problem would be to have a court investigate all settlements or agreements in connection with personal injuries claims. Wisconsin, it was stated, has a law requiring all agreements or contracts in connection with legal employment to be approved by the court. This Committee has no recommendation to make upon that point.

"It is perhaps worthy of consideration that Rule 1, which promulgates the rules of professional conduct, makes the willful breach of the rules of professional conduct punishable only by suspension for a period not to exceed one year, so, assuming the validity of the rules, no disbarment action could be brought for a violation thereof.

"It has been brought forcibly to the attention of the Committee that the very success of the efforts of the Bar Association to suppress ambulance chasing by lawyers would not remove the pernicious

incidents to the practice from the standpoint of the public. We are of the opinion that to remove the shyster lawyers from this class of cases would still leave that portion of the public which suffers from their machinations to the mercy of insurance adjusters, and we are not convinced that the public weal will be promoted by leaving injured persons not represented by counsel to the mercy of unscrupulous representatives of insurance companies.

"This is not to be construed, however, as an expression of the Committee's desire to permit lawyer ambulance chasers to continue their activities, but rather to point out the necessity of safeguarding teh public from the effect of leaving the problem with no further attention. This Committee believes that ambulance chasing can be suppressed, but respectfully submits that the Board of Trustees should consider the problem of exposing the public to the insurance carriers without adequate protection."

While the number of advertisements appearing in newspapers has materially reduced since the organization of your Committee, it is our finding nevertheless that such unprofessional conduct under Rule 2 exists to a large extent. Rule 2 of the Rules of Professional Conduct, effective July 24, 1928, states that: "A member of the State Bar shall not solicit professional employment by advertisementfi or otherwise. This rule shall not apply to the publication or use of ordinary professional cards or to conventional listings in legal directories." It is the opinion of your Committee that no intricate problem is here presented, but that such breach of ethics may easily be reached by the Local Administrative Committees of the State Bar.

A matter of serious consideration coming to the attention of your Committee was the use by collection agencies of letters and other forms of demand simulating court process. Such use is not expressly forbidden by statute, although subdivision 4 of section 1209 of the Code of Civil Procedure defines a contempt as "the abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of court." Your Committee is advised that New York is the only State which has an express statute against simulation of court process. The use of these forms has been brought to the attention of the City Prosecutor, and complaints were issued against certain persons using the forms. The action of Municipal Judge Chambers in holding the offenders in contempt has been effective in discouraging their use, and your Committee has communicated with several of the collection agencies using forms which would mislead the layman and cause him to believe that legal action had already been instituted. Your Committee is advised, however, that such practices continue.

Incidental to the subject of ambulance chasing has been the problem of dealing with unlicensed persons engaged in the solcitation and adjustment of damage cases. Your Committee believes that, furnished with a competent investigator, the evidence to substantiate complaint against attorneys co-operating with or employing such men could be gathered, and by one or two examples suppressed. Your Committee therefore recommends that the trustees authorize the employment of such an investigator.

Your Committee has been offered the financial backing of certain organizations interested in the suppression of ambulance chasing, but your Committee believes that the acceptance of such support would be incompatible with the dispassionate consideration of the problem, and your Committee recommends that, should any person or persons be employed, the expenses thereof be defrayed by the Association.

The creation of Local Administrative Committees of the State Bar has provided a proper forum for the hearing of complaints, but in as much as that body is concerned only with complaints brought to it, your Committee is of the opinion that the continuance of a committee of the Los Angeles Bar Association is necessary to present such matters to the Local Administrative bodies, and it is recommended that a definite arrangement of co-operation should be established.

Respectfully submitted,
John Beardsley, *Chairman*
George S. Dennison
Frank W. Stafford
Charles E. Millikan
Nathan Newby

Book Reviews

HARRY GRAHAM BALTER *of the Los Angeles Bar*
Assistant United States Attorney

THE MAKING OF THE CONSTITUTION; by Charles Warren; 824 pages; Little, Brown & Company, Boston; Price, $6.00.

Charles Warren, well known as the author of "The Supreme Court in United States History," which was awarded the Pulitzer Prize for the best book of 1922 on the history of the United States, has again given us a work which is intimately concerned with the development of our constitutional law, and yet is not a "law-book" in the strict sense. Indeed, the author has professedly striven to prevent his work from being a commentary on constitutional law.

The book is intended for all—laymen as well as lawyers — who are interested in watching the daily events of the crucial period in our national history when the Constitution was being made. Through skillful use of contemporary source materials, such as letters to and from the delegates to the Federal Convention, diaries, newspapers and pamphlets, the author places us behind the scenes and we are enabled to witness the spectacle. We see what happens during each day of the Convention, and we learn the sentiments of the framers of the Constitution. Nor do we overlook public opinion as it is presented in the public press. With all this material at hand, with this array of facts, the reader can then do his own theorizing and form his own opinions.

The author has recognized the current tendency to interpret history in terms of economics, sociology and geography, a tendency that is in large part a reaction from the old manner of writing history in terms of politics and wars. While he does not deny the existence or potency of the economic motive, Mr. Warren recognizes that it is only one among numerous motives, and that the hopes, fears, aspirations, ideals, beliefs and sentiments of the Fathers of the Constitution must be ascertained if we are truly desirous of knowing how and why the various clauses of the Constitution were framed.

The book is divided into three parts. Part One is concerned with the period before the Convention, and presents the fears of disunion because of the inadequacy of the Articles of Confederation; here also is described the relation between the delegates, the public and the press.

Part Two is devoted to the Convention, and describes the proceedings day by day, so that one may trace in a consecutive manner the origin and development of the important clauses of the Constitution.

Part Three deals with the opposition to the Constitution which was encountered after the Convention and prior to the ratification of the Constitution.

The author has succeeded admirably in catching the spirit of 1787, and presenting it in a vivid and colorful manner.

At a time when the temptation to tinker with the Constitution is great, it is well to absorb some of the atmosphere and spirit of 1787. Undoubtedly that is why Mr. Warren, formerly as Assistant Attorney-General of the United States, and now as private practitioner participating in the making of constitutional law, has written this novel volume, rather than a commentary on constitutional law.

ALBERT E. MARKS.

PROHIBITION, LEGAL AND ILLEGAL; by Howard Lee McBain, Ruggles Professor of Constitutional Law in Columbia University; 1928; ix and 171 pages; The MacMillian Company; New York City.

"* * * Thus, nothing can be more certain than that numerous written laws are a sign of a degenerate community and are frequently not the consequences of vicious morals in a state, but the causes. * * Laws ever increase in number and severity, until at length they are strained so tight as to break themselves." These words of Oliver Goldsmith could well be designated as the theme-refrain of the average commentary on our prohibition problem.

Prohibition, Legal and Illegal is written by too fine a scholar to be fanatically prejudicial one way or the other. Professor McBain presents a short, readable work that offers food for thought. Disregarding the attitude we may have towards moral-

preserving laws, one way or the other. Professor McBain points out some problems in the relations between State and citizen, and between Nation and State, that our National Prohibition law has created.

There can be no doubt that at least a minority, virulent beyond its size, is opposed in principle to the stemming of the flood of the joy-producing liquids. Asks the learned professor: Has the theory of our political institutions that the majority shall rule, been able to withstand the acid test where a brave minority (if it is a minority) persists in its denunciation of a law? We are warned: "There is no magic in fifty-one per cent that will alchemically produce obedience to law. The voice of a bare majority is not and never was the voice of God. * * * ." (p. 11.)

For nearly one-half of this little commentary, Professor McBain endeavors to answer the question: "What can we do about it?" And after we have digested his chapters on "Nullification," "Modification," and "States' Rights," we are faced with the conclusion that there is very little that can be done. So much at least is clear: By the ruling of the Supreme Court of the United States in Rhode Island v. Palmer, 253 U. S. 350 (1920), the responsibility of enforcing the National Prohibition Act is placed squarely upon the shoulders of the Federal government and not with the States: and this responsibility Congress has shirked.

However, that body realizes only too well that to enforce the law rigorously would be to do so at the expense of creating an extensive Federal police system which is foreign to our institutions. So Congress is stalling by marking time.

Meanwhile, the enforcement of the law, even to the partial extent to which it has been enforced has reawakened our interest in age-old constitutional rights which but for the reverberations resulting from flagrant violations of them, could continue to lie dormant and unobserved. So now we are alive to our protection against unlawful searches and seizures, to our right to trial by jury, to the unlawful forfeiture of property, and to our right to protection from double jeopardy.

Unfortunately, even such a renowned student of constitutional law as Professor McBain has little to offer by way of an effective solution. Almost half heartedly he proposes: "Perhaps the wisest of such experiments as are possible would be for Congress to adopt the prohibition laws of the various States as the prohibition law of the nation, retaining the Volstead Act for enforcement only in those States which refused to adopt prohibition as a State policy. Whether this would enable the wet States to liberalize the definition of intoxicating liquor so as to permit the sale of genuine wines and beer would, as has been said, depend upon whether the Supreme Court would accept as final the statutory definitions adopted by Congress. Unless the Court can be wooed to do this, all talk about modifying the Volstead Act is idle prattle. * * * ." (p. 167.)

Apart from the social aspect, all students of government should be interested in this observation which even the sincere proponents of the prohibition law must admit:

"The Eighteenth Amendment has profoundly altered our Federal system of government. In comparison, the commerce clause is a frail instrument of potential centralization. If Congress ever casts off hypocricy and sets up the necessary machinery for adequate Federal enforcement, we shall enjoy a national beaurocracy worthy of our boasted 'bigness' in other respects. No wonder Congress pauses before the plain logic of the amendment." (p. 168.)

This of course is the challenge of one who understands—not of a superficial observer.

This book should enjoy a wise patronage, because in its clarity of exposition it assists us in understanding some of the serious problems connected with the Volstead law. The fair-minded prohibitionist should welcome a study of this sort. Unintelligent fervor solves no problems.

HARRY GRAHAM BALTER.